IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2547 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ARIFBHAI USMANBHAI SHEIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2547 of 2004

MS SHAHIN QURESHI FOR MR MM TIRMIZI for Petitioner

MR AY KOGJE, LD.AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 04/08/2004

ORAL JUDGEMENT

1. By filing this petition, the petitioner-detenu has challenged the detention order passed against him by the detaining authority, by its order dated 6.2.2004

under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a "cruel person" under PASA. Along with the detention order, the petitioner has also been served with the grounds of detention.

2. In the grounds of detention, there is a reference about two criminal cases registered against the petitioner. The said cases are filed under secs.3, 5, 7 and 8 of the Bombay Animal Preservation Act as well as under sec.11-L of the Prevention of Cruelty to Animals Act and under sec.335 and 336 of the Bombay Provincial Municipal Corporations Act. It is alleged that, the petitioner is illegally slaughtering the animals and accordingly he is a 'cruel person' as per the definition given under the Act. After recording the subjective satisfaction, and after considering the statements of the witnesses, whose names have not been disclosed to the petitioner by claiming privilege under sec.9(2) of PASA, the detaining authority has detained him under PASA as a 'cruel person'. It is the therefore aforesaid order which is impugned in this petition at the instance of the detenu.

3. Learned Advocate for the petitioner has vehemently submitted that, the detention order was passed against three detenus. She further submitted that the two other co-detenus are also co-accused so far as case No.1 is concerned. It is further submitted that the Advisory Board has released the other two co-detenus by recommending the revocation of detention order. It is, therefore, submitted that, on the ground of parity, the order of detention passed against the petitioner is also required to be quashed and set aside.

4. Mr.Kogje, learned AGP, however, submitted that so far as other two co-detenus are concerned, only one case was registered against them, and they are co-accused so far as case No.1 is concerned. It is, therefore, submitted that the Advisory Board, therefore, recommended to revoke the said order on the ground that it cannot be said that they are habitual offenders, since only one case was registered against them. It is pointed out that, so far as the present petitioner is concerned, two cases are registered against the petitioner, by which he has been described as a habitual offender, and on that ground, the Advisory Board has not recommended the case of the present petitioner for the purpose of revoking the detention order.

5. It is not in dispute that, so far as the other

two co-accused of the aforesaid case are concerned, only one criminal case is filed. So far as the present petitioner is concerned, he has committed two offences within a short period and, therefore, it cannot be said that the case of petitioner and the case of other co-accused/detenus cannot be distinguished on the said ground. I, therefore, find no substance in the arguments of the learned advocate for the petitioner that on the ground of parity, the order of detention is required to be quashed and set aside.

6. It was next argued by the learned advocate for the petitioner that, the names of the witnesses, who have given the statements before the sponsoring authority has not been disclosed to the petitioner, and for want of giving such names of the witnesses, the right of the petitioner to make effective representation is vitiated. In this connection, the learned advocate for the petitioner has relied upon the decision of this Court rendered in the case of KISHOR NAGINBHAI PARMAR v. STATE OF GUJARAT, reported in 2000 (4) GLR 3236. A learned Single Judge of this Court has taken the view that, if the names of the witnesses are not disclosed on the ground of claiming privilege, the authority, before claiming such privilege, is required to make necessary inquiry about the background, character and antecedents of the detenu while recording subjective satisfaction. It has been observed in para 11 as under :

"11. In this view of the matter, the detaining authority while exercising powers under Section 9 (2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Sec. 9 (2) of the P.A.S.A. Act, has not taken any independent steps for considering general background, character, antecedents, criminal

tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Sec. 9 (2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

7. Since there is nothing on record to suggest that the aforesaid exercise was undertaken by the detaining authority before claiming privilege under sec.9(2) of PASA, and considering the aforesaid judgment of this Court, the privilege claimed by the authority under sec.9(2) of PASA can be said to be vitiated, which has denied the petitioner to make effective representation against such detention order. If these statements are not taken on record, then only two cases are registered against the petitioner under the Bombay Animal Preservation Act, as well as Prevention of Cruelty to Animals Act and Bombay Provincial Municipal Corporations Act. There is no sufficient material on record for coming to the conclusion that, by committing the aforesaid offences, the petitioner has violated the public order. Even there is no reference in the detention order that the activities of the petitioner is prejudicial to the public health in any manner.

8. Considering the aforesaid aspect of the matter, the privilege claimed by the authority for not disclosing the names of the witnesses under sec.9(2) of PASA can be said to be vitiated, in view of the aforesaid judgment of the learned Single Judge in the case of Kishor Naginbhai Parmar (supra), and therefore, on the aforesaid ground, the impugned order is required to be quashed and set aside.

9. For the foregoing reasons, this petition is allowed. The order of detention dated 6.2.2004 is quashed and set aside. The detenu, Arifbhai Usmanbhai Sheikh, is ordered to be set at liberty forthwith, if he is not required in connection with any other case. Rule is made absolute.

(P.B. Majmudar, J.)

syed/